A **GNANASEKARAN KRISHNASAMY**

v.

SURUHANJAYA PERKHIDMATAN AWAM, MALAYSIA & ORS

B

FEDERAL COURT, PUTRAJAYA
RICHARD MALANJUM CJ (SABAH & SARAWAK)
HASHIM YUSOFF FCJ
JAMES FOONG FCJ
C [CIVIL APPEAL NO: 01(F)-4-2009(W)]
26 APRIL 2010

ADMINISTRATIVE LAW: *Rules of natural justice - Dismissal - Whether there is a right to mitigate before the imposition of punishment for*
D *disciplinary offence under the General Order - Appellant asserting that decision in Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v. Utra Badi K Perumal should not be sustained for failure to comply with rules of natural justice and against logic - Whether appellant's assertion justified - Appellant admitted to disciplinary offence*
E *and sought forgiveness - Appellant made his plea of mitigation - Whether Federal Court was right in its conclusion in Utra Badi case - Whether decision in Utra Badi should be reviewed*

F The appellant was a public officer employed by the second respondent, holding the post of Timescale Security Officer in the Administration and Finance Division, Prime Minister's Department. By a letter dated 26 June 1992 the Chairman of the Group D Disciplinary Board of the Administration and Finance Division of the Prime Minister's Department wrote to the appellant informing
G him that the Disciplinary Board ('DB') was of the opinion that disciplinary action ought to be taken against him with a view of dismissal or reduction in rank under the General Order 26 of the Public Officers (Conduct and Discipline) (Chapter 'D') General Orders 1980 ('the GO'). Two charges were preferred against the
H appellant and he was asked to make a representation in writing in his defence. The appellant submitted his representation by a letter dated 15 July 1992 wherein he admitted to the disciplinary offences in the charges but gave reasons or circumstances for their commission. He sought for forgiveness and undertook not to
I repeat them in future. On 21 August 1992 the DB found him guilty on the two charges and imposed dismissal as punishment. His appeal to the Disciplinary Appeal Board was later dismissed. On 26 November 1993 the appellant commenced legal action

against the respondents for wrongful dismissal. The High Court dismissed the action. The appellant appealed to the Court of Appeal but his appeal was dismissed on 6 October 2008. On 5 March 2009 the Federal Court allowed one question for consideration when granting the appellant leave to appeal that is 'Whether the Federal Court in *Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v. Utra Badi K Perumal* was in fact right in concluding that there was no separate right to mitigate on punishment after a public officer was found to have committed a disciplinary offence and whether the Federal Court should review its previous decision in *Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v. Utra Badi K Perumal* as the said decision cannot stand close scrutiny in logic and the application of the rules of natural justice'.

Held (dismissing the appeal with costs)
Per Richard Malanjum CJ (Sabah & Sarawak) delivering the judgment of the court:

(1) In expressing their views, the learned judges of the Court of Appeal in *Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v. Utra Badi K Perumal* ('*Utra Badi* case') read into the relevant provisions of Public Officers (Conduct and Discipline) (Chapter 'D') of the GO and in particular Order 26 the concept of natural justice when their wordings were clear and unambiguous. They were probably influenced by the scheme 'guilt or innocence' as in a criminal case without giving much consideration to the wordings and the implications of the provisions themselves. Enquiry in disciplinary cases is not and should not take the colour of a criminal trial. This court agreed with the High Court judge's view in *Halimatussaadiah v. Public Service Commission, Malaysia & Anor* that 'O. 26(4) of the GO 'D' does not require the PSC to make such finding. What the PSC is required to decide is whether the explanation given by the plaintiff, had exculpated the plaintiff to the satisfaction of the PSC'. The overall scheme of the Public Officers (Conduct and Discipline) (Chapter 'D') of the GO should be considered and not to read in isolation each of the provisions in O. 26. Bearing this in mind and having read the Federal Court's reasons in *Utra Badi* case, this court was inclined to agree with the conclusion therein. (paras 27, 28, 29, 30, & 31)

(2) In the present case, the appellant admitted to the disciplinary offences as charged and sought for forgiveness. Thus it could be said that the appellant on his own volition did make his plea of mitigation in the same representation. As such the DB was entitled 'to proceed to consider and decide on the dismissal or reduction in rank' of the appellant. The question of him being prejudiced did not arise. To say that the conclusion in *Utra Badi* case is contrary to the rules of natural justice and against logic is, overlooking the clear wordings of the relevant provisions and reading into the rules, concept or scheme which are not necessary when applying and enforcing those provisions in the GO. (paras 35 & 36)

(3) The question posed before the court should be answered in two parts. Whether this court was right in its conclusion in *Utra Badi* case was answered in the affirmative. Whether this court should review the decision in *Utra Badi* case for the reasons stated by the appellant was answered in the negative. (paras 37 & 38)

Bahasa Malaysia *Translation Of Headnotes*

Perayu adalah pegawai awam yang bekerja dengan responden kedua, memegang jawatan Timescale Security Officer di dalam Bahagian Pentadbiran dan Kewangan, Jabatan Perdana Menteri. Melalui surat bertarikh 26 Jun 1992, Pengerusi Kumpulan D Lembaga Disiplin Bahagian Pentadbiran dan Kewangan Jabatan Perdana Menteri telah menulis surat kepada perayu memberitahu bahawa Lembaga Disiplin ('LD') berpendapat tindakan disiplin mesti dikenakan ke atas perayu dengan tindakan pemecatan atau penurunan pangkat di bawah Peraturan 26 Perintah-perintah Pegawai Awam (Kelakuan dan Tatatertib) (Bab 'D') 1980 ('GO'). Dua pertuduhan telah dibuat terhadap perayu dan beliau diarah membuat representasi dalam penulisan pembelaannya. Perayu membuat representasinya melalui surat bertarikh 15 Julai 1992 di mana beliau mengaku telah melakukan kesalahan-kesalahan disiplin tetapi telah memberi alasan-alasan dan hal keadaan mengapa beliau telah bertindak sedemikian. Perayu telah memohon maaf dan telah berjanji tidak akan berkelakuan seperti itu lagi. Pada 21 Ogos 1992 LD telah mendapati bahawa perayu bersalah atas kedua-dua pertuduhan dan mengenakan tindakan pembuangan kerja sebagai hukuman. Rayuan perayu ke Lembaga Rayuan Disiplin ditolak. Pada 26 November 1993 perayu memulakan tindakan undang-undang terhadap responden-responden kerana pemecatan salah.

Mahkamah Tinggi telah menolak tuntutan tersebut. Perayu merayu ke Mahkamah Rayuan tetapi rayuannya telah ditolak pada 6 Oktober 2008. Pada 5 Mac 2009 Mahkamah Persekutuan membenarkan satu persoalan untuk dipertimbangkan apabila memberi kebenaran untuk merayu iaitu 'sama ada Mahkamah Persekutuan di dalam kes *Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v. Utra Badi K Perumal* adalah betul apabila membuat kesimpulan bahawa tidak terdapat hak yang berasingan untuk membuat mitigasi selepas seorang pegawai awam didapati membuat kesalahan disiplin dan sama ada Mahkamah Persekutuan sepatutnya membuat semakan ke atas keputusannya di dalam kes tersebut kerana keputusan tersebut tidak boleh dipertahankan apabila dilihat dengan terperinci secara logik dan pemakaian kaedah-kaedah keadilan asasi.

Diputuskan (menolak rayuan dengan kos)
Oleh Richard Malanjum HB (Sabah & Sarawak) menyampaikan penghakiman mahkamah:

(1) Dalam memberi pemandangan mereka, hakim-hakim Mahkamah Rayuan di dalam *Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v. Utra Badi K Perumal* ('kes *Utra Badi*') telah membaca konsep keadilan asasi ke dalam peruntukan relevan A. 26 Perintah-Perintah Am (Kelakuan dan Tatatertib) (Bab D) 1980 di mana perbahasaannya jelas dan tidak kabur. Mereka mungkin dipengaruhi oleh skim 'bersalah atau tidak bersalah' seperti di dalam kes jenayah tanpa memberi pertimbangan kepada perkataan-perkataan dan implikasi-implikasi peruntukan-peruntukan. Siasatan di dalam kes-kes disiplin tidak sepatutnya disamakan dengan perbicaraan jenayah. Mahkamah ini bersetuju dengan pendapat hakim Mahkamah Tinggi di dalam kes *Halimatussaadiah v. Public Service Commission, Malaysia & Anor* bahawa 'Per. 26(4) GO tidak memerlukan PSC membuat pendapatan tertentu. Apa yang perlu dibuat oleh PSC adalah untuk memutuskan sama ada penjelasan yang diberi oleh plaintif telah membersihkan dirinya sehingga memuaskan PSC.' Skim keseluruhan Perintah-perintah Pegawai Awam (Kelakuan dan Tatatertib) (Bab 'D') 1980 sepatutnya dipertimbangkan dan bukan dibaca secara sendiri setiap peruntukan di dalam Peraturan 26. Oleh yang demikian, dan setelah membaca alasan-alasan Mahkamah Persekutuan di dalam kes *Utra Badi*, mahkamah ini bersetuju dengan kesimpulannya.

(2) Dalam kes semasa, perayu telah mengaku melakukan kesalahan-kesalahan disiplin seperti di dalam pertuduhan dan telah memohon maaf. Ia boleh dikatakan bahawa perayu atas kehendaknya sendiri telah membuat rayuan meringankan hukuman di dalam representasi yang sama. Oleh itu LD mempunyai hak untuk 'meneruskan bagi menimbang dan memutuskan pembuangan atau penurunan pangkat' perayu. Persoalan sama ada perayu diprejudis tidak berbangkit. Untuk menyatakan bahawa keputusan di dalam kes *Utra Badi* adalah bertentangan dengan kaedah-kaedah keadilan asasi dan logik, adalah tidak mengendahkan perkataan-perkataan yang jelas dalam peruntukan-peruntukan relevan dan membaca kedalamnya kaedah-kaedah, konsep atau skim yang tidak diperlukan apabila memakai dan menguatkuasakan peruntukan-peruntukan di dalam GO.

(3) Persoalan di hadapan mahkamah dijawab dalam dua bahagian. Persoalan sama ada mahkamah betul di dalam kesimpulannya di dalam kes *Utra Badi* dijawab secara afirmatif. Persoalan sama ada mahkamah patut membuat semakan keputusan di dalam kes *Utra Badi* disebabkan alasan-alasan yang telah dinyatakan oleh perayu dijawab dengan negatif.

Case(s) referred to:

Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors [2010] 5 CLJ 865 FC ***(refd)***

Anandarajan & Ors v. Mahadevan [1971] 1 LNS 3 FC ***(refd)***

Ghanasekaran Krishnasamy v. Suruhanjaya Perkhidmatan Awam Malaysia & Anor [2009] 3 CLJ 287 ***(refd)***

Hjh Halimatussaadiah Hj Kamaruddin v. Public Service Commission, Malaysia & Anor [1992] 1 CLJ 413; [1992] 2 CLJ (Rep) 467 HC ***(foll)***

Inspector-General of Police & Anor v. Alan Noor Kamat [1987] 1 LNS 101 SC ***(refd)***

Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v. Utra Badi K Perumal [2000] 3 CLJ 224 CA ***(refd)***

Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v. Utra Badi K Perumal [2001] 2 CLJ 525 FC ***(foll)***

Tan Ying Hong v. Tan Sian San & Ors [2010] 2 CLJ 269 FC ***(refd)***

Legislation referred to:

Federal Constitution, art. 135(2)

Public Officers (Conduct and Discipline) (Chapter 'D') General Orders 1980, GO 26(4), (5)

Constitution of India [India], art. 311(2)

For the appellant - Karpal Singh; M/s Karpal Singh & Co
For the respondent - Datin Azizah Hj Nawawi SFC; AG's Chambers

[Appeal from Court of Appeal; Civil Appeal No: W-01-98-07]

Reported by Susheila Sreedharan

JUDGMENT

Richard Malanjum CJ (Sabah & Sarawak):

[1] On 5 March 2009 this court allowed one question for its consideration when granting the appellant leave to appeal. The Court of Appeal had dismissed his appeal against the decision of the High Court rejecting his claim for wrongful dismissal.

[2] The question reads:

> Whether the Federal Court in *Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v. Utra Badi K Perumal* [2001] 2 CLJ 525 was in fact right in concluding that there was no separate right to mitigate on punishment after a public officer was found to have committed a disciplinary offence and whether the Federal Court should review its previous decision in *Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v. Utra Badi K Perumal* [2001] 2 CLJ 525 as the said decision cannot stand close scrutiny in logic and the application of the rules of natural justice.

[3] Simply put the question is asserting that in term of logic and the rules of natural justice the decision of this court in *Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v Utra Badi K Perumal (supra)* ('*Utra Badi* case') should not be sustained.

[4] Our task therefore is to re-examine that decision and to conclude whether we agree with it or the assertion of the appellant. But first the brief background facts.

[5] In 1976 the appellant was a public officer employed by the second respondent, Government of Malaysia, holding the post of Timescale Security Officer in the Administration and Finance Division, Prime Minister's Department. He started his employment with the second respondent as a general labourer in 1974.

[6] By a letter dated 26 June 1992 the chairman of the Group D Disciplinary Board of the Administration and Finance Division of the Prime Minister's Department wrote to the Appellant informing him that the Disciplinary Board (DB) was of the opinion that disciplinary action ought to be taken against him with a view of dismissal or reduction in rank under the General O. 26 of the Public Officers (Conduct and Discipline) (Chapter 'D') General Orders 1980 (the GO).

[7] In the said letter two charges were preferred against the Appellant. The first was in relation to him being absent from work in the morning on 9 May 1991 from 7.10am to 7.30am. The second was related to an incident of him punching a Senior Timescale Security Officer of the same division on 15 May 1991. The appellant was asked to make a representation in writing in his defence. It was also made clear to the appellant that failing to make his representation within 21 days for the receipt of the said letter, it would be assumed that he was not defending himself and the matter would be decided by the DB based on the evidence available.

[8] By a letter dated 15 July 1992 the appellant submitted his representation. He admitted the disciplinary offences as disclosed in the charges but gave the reasons or the circumstances for their commission. He sought for forgiveness and undertook not to repeat them in future.

[9] On 21 August 1992 the DB, after considering the charges and the representations made by the appellant as contained in his letter, found him guilty on the two charges. The DB also decided to impose dismissal as the appropriate punishment against the appellant. His subsequent appeal to the Disciplinary Appeal Board was dismissed on 15 March 1993.

[10] On 26 November 1993 the appellant commenced legal action by way of writ action against the respondents for wrongful dismissal. It is not in the Appeal Record that the respondents objected to the mode of commencement of action by the appellant. Thus, the issue as to the mode of commencement of action is not before us. (See: *Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 5 CLJ 865.

[11] The High Court on 24 August 2007 dismissed the action basically on the grounds:

a. that there was no issue of the DB failing to give its reasons for finding him guilty of the offences since the appellant admitted committing the disciplinary offences as stipulated in the charges;

b. that the unexplained delay in commencing disciplinary action against the appellant should not nullify his dismissal as there was no 'suggestion of the existence of some element behind the unexplained delay such as bad faith'; and

c. that the application to amend the statement of claim to add another ground, namely, the failure to give the appellant an opportunity to make a plea in mitigation before the punishment was meted, in order to nullify the dismissal of the appellant had to be disallowed since it would be exercise in futility in view of the decision of this court in the *Utra Badi* case.

[12] The appellant appealed to the Court of Appeal. In dismissing his appeal on 6 October 2008 the Court of Appeal held:

a. that the learned trial judge was right in refusing to allow the application to amend the statement of claim of the appellant in view of the decision of this court in the *Utra Badi* case;

b. that the learned trial judge did not err in refusing to find that the unexplained delay in commencing the disciplinary action against the appellant rendered the dismissal a nullity. The delay was only about one year and there was no allegation of bad faith. The appellant also admitted committing the offences. Each case should depend on its own facts;

c. that there was no evidence of condonation in any form on the part of the respondents for what the appellant had done; and

d. that the disciplinary proceeding conducted against the appellant was in compliance with the GO. That 'O. 26(4) of the General Orders 1980 clearly provides that if the officer furnishes a representation which fails to exculpate himself to the satisfaction of the Appropriate Disciplinary Authority, it shall then proceed to consider and decide on, *inter alia*, the dismissal of the officer. In his representation to the disciplinary authority, the appellant admitted having committed the offences that he was charged with. He then prayed for leniency and promised not to repeat such offences in the future. Under these circumstances, we find no injustice has been occasioned.

[13] Although there were several reasons given by the High Court and the Court of Appeal in dismissing the claim by the appellant for wrongful dismissal this court only allowed him to pose one question as above. The basic issue is whether there is a right to mitigate before the imposition of punishment for disciplinary offence under the GO.

[14] At the outset of the hearing of this appeal learned Senior Federal counsel appearing for the respondents raised a preliminary objection. She pointed out that the issue covered by the question posed was not a pleaded issue in the statement of claim of the appellant nor was it an issue decided by the High Court.

[15] In response learned counsel for the appellant argued that they wanted the issue of right to mitigate, considered by the High Court. However in view of the decision in *Utra Badi* case, the High Court declined to allow the application to amend the statement of claim.

[16] We dismissed the preliminary objection. We were of the opinion that in an indirect way the issue of whether there is a right to mitigate before punishment is imposed under the GO was before the High Court for consideration. However, in view of the decision in *Utra Badi* case and being bound by it the learned High Court Judge had no choice but to decide as he did. Thus, since the question posed is focused on the decision in *Utra Badi* case it is only fair that this appeal should not be dismissed *in limine*.

[17] In his submission before us for the appeal proper learned counsel for the appellant strenuously contended that there is such a right to mitigate upon being found guilty for disciplinary offence under the GO. He cited several decisions of the Indian courts to support his contention. He urged this court to depart from its earlier decision in *Utra Badi* case.

[18] In reply learned Senior Federal Counsel submitted that there were two parts to the question posed. She argued that:

a. in respect of the first part, namely, on the right to mitigate, the wordings of O. 26(4) of the GO was correctly interpreted in *Utra Badi* case. Where an officer who is subject to the General Orders does not furnish his representation or that his representation fails to exculpate himself to the satisfaction of the Disciplinary Authority, the said Order empowers the Disciplinary Authority **to proceed to consider and decide** on

the dismissal or reduction in rank of the officer without the necessity of hearing his mitigation prior to the imposition of punishment; (emphasis added) and

b. in respect of the second part, that is, in relation to logic and the rules of natural justice, the decision in *Utra Badi* case does not go against the rules of natural justice. The rules of natural justice do not require that the appellant should have been given adequate notice of his impending punishment. 'What the rules of natural justice required was that the nature of the accusations, as opposed to the punishment which could be inflicted upon him if those accusations were proved to be true, was made known to him' (*Anandarajan & Ors v. Mahadevan* [1971] 1 LNS 3).

[19] Since the determination of the question posed calls for the re-examination on the interpretation of O. 26, in particular O. 26(4), of the GO as given in *Utra Badi* case it is only appropriate and for convenience that we should reproduce the relevant provisions herein *in toto*. Thus it reads:

26 (1) Where it is represented to, or is found by, the appropriate Disciplinary Authority that an officer is guilty of unsatisfactory work or misconduct and such work or misconduct, in the opinion of the Disciplinary Authority, merits dismissal or reduction in rank, the provisions of the following paragraphs shall apply.

(2) The appropriate Authority shall, after considering all the available information in its possession that there is a *prima facie* case for dismissal or reduction in rank, cause to be sent to the officer a statement in writing, prepared, if necessary with the aid of the Legal Department, of the ground or grounds; on which it is proposed to dismiss the officer or reduce him in rank and shall call upon him to state in writing within a period of not less than fourteen days from the date of receipt of the letter a representation containing grounds upon which he relies to exculpate himself.

(3) If after consideration of the said representation, the appropriate Disciplinary Authority is of the opinion that the unsatisfactory work or conduct of the officer is not serious enough to warrant dismissal or reduction in rank, the Disciplinary Authority may impose upon the officer such lesser punishment as it may deem fit.

A (4) *If the officer does not furnish any representation within the specified time, or if he furnishes a representation which fails to exculpate himself to the satisfaction of the appropriate Disciplinary Authority, it shall then proceed to consider and decide on the dismissal or reduction in rank of the officer.'* (emphasis added).

B (5) Where the appropriate Disciplinary Authority considers that the case against the officer requires further clarification, it may appoint a Committee of Inquiry consisting of not less than two senior Government officers
C who shall be selected with due regard to the standing of the officer concerned and to the nature and gravity of the complaints which are the subject of the inquiry, provided that an officer lower in rank than the officer who is the subject of the inquiry or the officer's Head of Department shall not be selected to be a member of the Committee.

D (6) The officer shall be informed that, on a specified day, the question of his dismissal or reduction in rank will be brought before the Committee and that he will be allowed and if the Committee shall so determined, shall be required to appear before the Committee and exculpate
E himself.

(7) If witnesses are examined by the Committee, the officer shall be given an opportunity to be present and to question the witnesses on his own behalf and no documentary evidence shall be used against him unless he has previously
F been supplied with a copy thereof or given access thereto.

(8) The Committee may, permit the Government or the officer to be represented by an officer in the public service or, in exceptional cases, by an advocate and solicitor and
G may at any time, subject to such adjournment as is reasonably necessary to enable the officer to present his case in person, withdraw such permission.

Provided that where the Committee permits the Government to be represented, it shall also permit the
H officer to be similarly represented.

(9) If, during the course of the inquiry, further grounds for dismissal are disclosed, and the appropriate Disciplinary Authority thinks fit to proceed against the officer upon such grounds, the officer shall be furnished with a
I written statement thereof and the same steps shall be taken as are prescribed above in respect of the original grounds.

(10) The Committee having inquired into the matter, shall make a report to the appropriate Disciplinary Authority. If the Disciplinary Authority considers that the report is not clear in any respect or that further inquiry is desirable, the matter may be referred back to the Committee for further inquiry and report.

(11) If, upon considering the report of the Committee, the appropriate Disciplinary Authority is of the opinion:

(a) that the officer should be dismissed or reduced in rank, it shall forthwith direct accordingly;

(b) that the officer does not deserve to be dismissed or reduced in rank, but deserves some lesser punishment, it may inflict upon the officer such lesser punishment as it may deem fit; or

(c) that the proceedings disclose sufficient grounds for requiring him to retire in the public interest, it shall recommend to the Government accordingly. The question of pension will be dealt with under the Pensions Act.'

[20] And in construing the foregoing provisions art. 135(2) of the Federal Constitution should be borne in mind. It reads:

(2) No member of such a service as aforesaid shall be dismissed or reduced in rank without being given a reasonable opportunity of being heard:

Provided that this Clause shall not apply to the following cases:

(a) where a member of such a service is dismissed or reduced in rank on the ground of conduct in respect of which a criminal charge has been proved against him; or

(b) where the authority empowered to dismiss or reduce in rank a member of such a service is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to carry out the requirements of this Clause; or

(c) where the Yang di-Pertuan Agong, or, in the case of a member of the public service of a State, the Ruler or Yang di-Pertua Negeri of that State, is satisfied that in the interests of the security of the Federation or any part thereof it is not expedient to carry out the requirements of this Clause; or

(d) where there has been made against a member of such a service any order of detention, supervision, restricted residence, banishment or deportation, or where there has been imposed on such a member any form of restriction or supervision by bond or otherwise, under any law relating to the security of the Federation or any part thereof, prevention of crime, preventive detention, restricted residence, banishment, immigration, or protection of women and girls:

Provided further that for the purpose of this Article, where the service of a member of such a service is terminated in the public interest under any law for the time being in force or under any regulation made by the Yang di-Pertuan Agong under Clause (2) of Article 132, such termination of service shall not constitute dismissal whether or not the decision to terminate the service is connected with the misconduct of or unsatisfactory performance of duty by such member in relation to his office or the consequences of the termination involved an element of punishment; and this proviso shall be deemed to have been an integral part of this Article as from Merdeka Day.

[21] It is not in dispute and indeed as found by the courts below that in the present case the offences disclosed in the charges were admitted by the appellant. It was therefore of little consequence when the DB found him guilty of the offences as charged.

[22] Having found him guilty, must the DB hear his mitigation before imposing the punishment appropriate for the offences? In *Utra Badi* case this court held that 'there is certainly no separate right to make representations upon the punishment that ought to be meted out to the officer to be dismissed or reduced in rank'. Thus, the question to ask is whether this court was correct in coming to such a conclusion which was arrived at after considering several earlier judicial decisions both local and foreign.

[23] And in considering the foregoing question it is noted that this court also held in *Utra Badi* case that the view expressed by Salleh Abas LP in *Inspector-General of Police & Anor v. Alan Noor Kamat* [1987] 1 LNS 101; [1988] 1 MLJ 260 was part of the *ratio decidendi* of the judgment in that case. As such that view was followed by this court in its judgment in *Utra Badi* case. This is what was said at p. 262:

> As it stands, this passage appears to be misleading. This passage should be read in the light of the factual situation of this case, wherein the show cause letter dated May 14, 1980 was completely silent as to the contemplated punishment to be imposed at the end of the disciplinary proceedings. Therefore, in order to ensure that the respondent understood and appreciated the seriousness of the proceedings he was facing, the learned trial judge was right in insisting that another chance must be given to him, which he called a plea of mitigation. *If, however, the show cause letter had included the proposed punishment, for example, by the inclusion of such statement as "This proceeding is taken against you with a view to dismissal or reduction in rank …" or "This proceeding is taken under G.O.D. 30 with a view to dismissal or reduction in rank …", or such other phraseology as would give the effect of making the respondent understand the nature of the proceedings and what they would lead to, there is no necessity for the appellants to give another opportunity of being heard before the punishment is imposed*. (emphasis added).

[24] However, the Court of Appeal as well as the High Court in *Utra Badi* case held that what was said by Salleh Abas LP was mere *obiter* and that they were not bound by it. As such both courts below went on to hold that there was a right to mitigate before punishment should be imposed for disciplinary offence. This is how two of the Court of Appeal judges respectively expressed their views: – *Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v. Utra Badi K Perumal* [2000] 3 CLJ 224:

Per Gopal Sri Ram JCA (as he then was) said at pp. 229-238:

> The issue in this appeal concerns the right to procedural fairness. It is a constitutional right. It forms one of the cornerstones of our public law jurisprudence. It is an issue which our courts have already dealt with in several cases … Although the content of procedural fairness is well settled, its application varies according to the facts of each particular case. It is necessary to allude to the factual matrix relevant to this appeal in order to appreciate the issues ...
>
> To recapitulate, in *Inspector General of Police v. Alan Noor bin Kamat*, Ajaib Singh J, at first instance, took the view that the disciplinary process involved two separate exercises, the first a finding as to guilt and the second as to punishment. However, the Supreme Court was of opinion that both guilt and punishment are to be considered in one composite exercise. That, in essence, is the difference in the approach.
>
> With much respect, I am unable to accept the view subscribed to by the Supreme Court. In my judgment, save in those cases falling under Part III of the general orders,

there are two separate and distinct steps in the public service disciplinary process. The first step is for the disciplinary authority to decide upon the issue of guilt or innocence. If the decision is in favour of the employee, that is the end of the matter. But if the relevant authority finds the public servant guilty, then, and then only, does the question of punishment arise. And as may be seen from general order 36, that there is a wide choice in the type of punishment that may be meted out. As may be seen from general order 36, it ranges from a mere warning to the ultimate punishment of dismissal.

The combined effect of arts 5(1) and 8(1) of the Federal Constitution is, in my judgment, to demand fairness both in procedure and in substance whenever a public law decision has an adverse effect on any of the facets of a person's life. See *R Rama Chandran v. The Industrial Court of Malaysia & Anor; Kumpulan Perangsang Selangor Bhd v. Zaid Hji Mohd Noh* [1997] 1 MLJ 789. Among these facets are a person's livelihood and his reputation.

Procedural fairness demands not only the right in a public servant to make representations on the truth of the charges framed against him. It includes the right, after a finding of guilt is made against him, to make representations on the question of punishment. That this must be the case may be seen by examining the disciplinary process itself.

In my view, the *obiter dictum* of the Supreme Court in *Inspector General of Police v. Alan Noor bin Kamat* is plainly wrong. It was expressed without the benefit of a mature argument upon the combined effect of arts. 5(1) and 8(1) of the Federal Constitution.

I am therefore satisfied that both Ajaib Singh J's remark at first instance and the Supreme Court's comment upon it on the appeal in *Inspector General of Police v. Alan Noor bin Kamat* are both merely *obiter dicta* as they were unnecessary for the actual decision in that case. It follows that I am in agreement with the learned trial judge in his interpretation of that case.'

(Incidentally, it may be noted that Gopal Sri Ram JCA (as he then was) was a member of the panel in the Court of Appeal which heard and dismissed the appellant's appeal in the present case: ([2009] 3 CLJ 287).

Per Siti Norma Yaakob JCA (as she then was) said at p. 249: A

> From the language of the show cause letter and in the light of the alternative punishments that might be imposed on the respondent, it was my considered opinion that the respondent should have been given the opportunity to plead in mitigation before any punishment was meted against him. This reasoning, I say runs in line with the provisions of general order 23 which states that in all disciplinary proceedings under Part II of the Code, no officer shall be dismissed or reduced in rank unless he has been afforded a reasonable opportunity of being heard. My reasoning, too, harmonises with the provisions of art 135(2) of the Federal Constitution which provides that no member of the public service 'shall be dismissed or reduced in rank without being given (a) reasonable opportunity of being heard'. B C
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> In the circumstances of this appeal, I say that the right to be heard extended not only to the first stage of the proceedings before the first appellant but also to the second stage before punishment was passed. In this instance, the first appellant accorded the respondent the opportunity to be heard in answer to the charge but had denied his right to plead in mitigation before dismissing him. Since dismissal has been identified by the first appellant to be one of two punishments that could be imposed on the respondent and I am mindful that dismissal is the most extreme punishment that could befall a public servant, justice and fair play dictate that the right to plead in mitigation should have been accorded to the respondent although general order 26 of the Code under which these proceedings were brought is silent on this score. Under these circumstances, I say that the proceedings before the first appellant were flawed in that there had been procedural unfairness and as such cannot be sustained. D E F G

[25] On appeal this court after chastising the Court of Appeal for not accepting 'loyally the decision of the higher tiers' (obviously referring to *Inspector General of Police & Anor v. Alan Noor Kamat (supra)*) allowed the appeal by the appellant, *Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor*, premised on these words at pp. 540, 541, 542, 550, 551: H

> On a proper analysis of the cases cited, however, we were of the considered opinion that the remarks made in *Alan Noor bin Kamat*'s case formed part of the ratio. It was not a mere chance remark, nor a subsidiary reason for the main principle and the finding was quite necessary for the decision reached. I
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In effect, the above provision prescribes that the respondent can only be dismissed if he has been given a reasonable opportunity to be heard. As submitted by the learned leading Senior Federal Counsel that the letter to the respondent to show cause dated 31 January 1991 conveyed with sufficient clarity and certainty the contemplated punishment, namely dismissal or reduction in rank. The grounds were fully spelt out in the letter and the charge was well drafted as it laid down all the important and relevant particulars. Any reasonable person would have had no difficulty in responding to the allegations made. The opportunity, reasonable and sufficient, was given to the respondent to make a representation to rebut the charge.

In essence, the undoubted overall effect of the show cause letter illustrated that the respondent had at the earliest available moment been informed of the two possible punishments under consideration should he not be able to exculpate himself of the charge made. With all these in mind, he had been accorded every opportunity to defend himself. This was, in fact, what the respondent did by a letter dated 7 February 1991. However, he made no representation as regards punishment, though he had been made aware of the two possibilities. Can he now say that he had been deprived of that opportunity?

The issue that arises is whether, with art. 135(2) of the Constitution in mind, that provision gave the respondent the right to make a plea in mitigation before punishment is imposed.

...

We next look at para (4) of general order 26 of the General Orders which is the very paragraph affecting the leave question. As stated earlier in this judgment, it reads:

> (4) If the officer does not furnish any representation within the specified time, or if he furnishes a representation which fails to exculpate himself to the satisfaction of the appropriate Disciplinary Authority, it shall then proceed to consider and decide on the dismissal or reduction in rank of the officer.

Would the words 'it shall then proceed to consider and decide on the dismissal or reduction in rank of the officer' mean that there should be another separate hearing just to consider that after asking for the officer's views again? We do not think so.

...

> Taking all the above into consideration, we are of the view that the General Orders, in detailing the procedures therein, have sufficiently complied with art. 135(2) of the Federal Constitution and, in the process, are in accord with the concept of natural justice and procedural fairness. As succinctly stated by the learned leading Senior Federal Counsel in his submissions and as propounded in the long line of authorities considered, *there is certainly no separate right to make representations upon the punishment that ought to be meted out to the officer to be dismissed or reduced in rank. In fact, under para (4) of General Order 26 of the General Orders, the first appellant is not even required to make a finding of guilt which strongly indicates that there is only one hearing for a show cause letter issued under that General Order. We therefore find that no injustice had been occasioned to the respondent by the failure to hear his mitigation separately*. (emphasis added).

[26] At the outset we do not think we should make any conclusion whether the view expressed by Salleh Abas LP in *Alan Noor bin Kamat*'s case was a ratio or an *obiter*. In our view it does not matter for whichever it is our primary task is to determine whether the assertion by the appellant against the conclusion in *Utra Badi* case is justified. After all this court is not necessarily bound by its own earlier decision and may depart from it where necessary. (See: *Tan Ying Hong v. Tan Sian San & Ors* [2010] 2 CLJ 269).

[27] The appellant urges us to depart from the decision of this court in *Utra Badi* case as the decision has failed to comply with the rules of natural justice and against logic. In other words the approach taken by the Court of Appeal should be adopted.

[28] At first blush what were said by the learned judges of the Court of Appeal in *Utra Badi* case seemed appealing and convincing. However, with due respect, we are of the opinion that in expressing their views the learned judges read into the relevant provisions the concept of natural justice and probably much influenced by the scheme 'guilt or innocence' as in a criminal case without giving much consideration to the wordings and the implications of the provisions themselves.

[29] We would further say that the overall scheme of the Public Officers (Conduct and Discipline) (Chapter 'D') of the GO should be duly considered and not to read in isolation each of the provision in O. 26. Bearing therefore this in mind and having read the reasons of this court in *Utra Badi* case we are inclined to agree with the conclusion thereof.

[30] Indeed we note that much reliance was placed by the Court of Appeal in *Utra Badi* case on decisions by the Indian courts and so did the learned counsel for the appellant before us. However, as discussed by this court in *Utra Badi* case and in the cases referred therein reliance on those Indian cases must be done with care. Basically the Indian courts were interpreting a legislation whose wordings were quite different. For instance the Indian courts were concerned with the meaning of the phrase 'until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him' (art. 311(2)) of the Indian Constitution whereas in art. 135(2) of our Federal Constitution it only provides 'a reasonable opportunity to be heard'. As indicated in those cases the requirements differ.

[31] As noted above the Court of Appeal in *Utra Badi* case read into the relevant provisions of Public Officers (Conduct and Discipline) (Chapter 'D') of the GO and in particular O. 26 the concept of natural justice when their wordings are clear and unambiguous. It should be borne in mind that the procedures prescribed therein are not intended to find the guilt or innocence of an officer charged as in a criminal trial. Further, the finding of guilt in disciplinary action under the GO should not be equated with the kind of guilt as in any criminal case. Enquiry in disciplinary cases is not and should not take the colour of a criminal trial. To that extent we agree, as was this court in *Utra Badi* case, with the view expressed by the learned High Court judge in *Hjh Halimatussaadiah Hj Kamaruddin v. Public Service Commission, Malaysia & Anor* [1992] 1 CLJ 413; [1992] 2 CLJ (Rep) 467 that 'O. 26(4) of the GO 'D' does not require the PSC to make such finding. What the PSC is required to decide is whether the explanation given by the plaintiff, had exculpated the plaintiff to the satisfaction of the PSC'.

[32] Of course we are conscious of the contention that an officer facing disciplinary action should not be compelled to make his plea in mitigation within his representation as that would be prejudicial to him since at that stage he is yet to be found 'guilty' of the charge preferred against him.

[33] However, as explained in the *Utra Badi* case and in the earlier cases, the relevant provisions in the Public Officers (Conduct and Discipline) (Chapter 'D') of the GO provide clear procedures and steps to be taken against an officer facing a disciplinary action. For instance, under O. 26, a *prima facie* case

must be found first in a complaint against an officer before a charge is served on him. And in the charge itself the officer is made aware of the possible punishments if he fails to make his representation or if it does not exculpate him. In fact under O. 26(4) punishment is only imposed in an obvious and clear case of 'guilt' as per charge. Otherwise the DB has to consider the subsequent provisions therein which we think deal with cases where there is real dispute or denial by an officer of the allegation against him. Where no representation is made or there is admission to the disciplinary offence or that the representation does not exculpate the officer, O. 26(4) should apply.

[34] We find it quite glaring the flaw in the assertion made before us by the appellant. For instance, where an officer is served with a show cause letter stating the disciplinary offence he is alleged to have committed and the possible punishment that could be imposed against him, does not make any representation as requested or admit to the disciplinary offence as in the instant case or the representation is obviously without merit and does not exculpate him, should another hearing or representation be afforded to him before punishment is imposed? We do not think so. Would such hearing be an exercise in futility? We think so. After all in the event that further clarification is required O. 26(5) and the subsequent provisions thereof of the GO are available to be complied with accordingly.

[35] Reverting to this present case, the appellant admitted to the disciplinary offences as charged and sought for forgiveness. In such circumstance it could be said that on his own volition the appellant did make his plea of mitigation in the same representation. As such the DB was entitled 'to proceed to consider and decide on the dismissal or reduction in rank' of the appellant. Therefore the question of him being prejudiced does not arise.

[36] Thus, to say that the conclusion in *Utra Badi* case is contrary to the rules of natural justice and against logic is, in our view, overlooking the clear wordings of the relevant provisions and reading into them rules, concept or scheme which are not necessary when applying and enforcing those provisions in the GO.

A **[37]** Accordingly, for the question posed we would answer it in two parts. Whether this court was right in its conclusion in the *Utra Badi* case our answer is in the affirmative. Whether we should review the decision in the *Utra Badi* case for the reasons stated by the appellant our answer is in the negative.

B **[38]** This appeal is therefore dismissed with costs.

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